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Item 5 of the provisional agenda

DEVELOPMENT OF LEGAL INSTRUMENTS FOR TRANSBOUNDARY WATERS

Progress report by the secretariat

I. INTRODUCTION

1. At the second session of the Preparatory Committee for the United Nations Conference on Environment and Development, Working Group II considered the protection of the quality and supply of freshwater resources. The Working Group emphasized the need to take into account the work of the International Law Commission of the United Nations in developing legal instruments for the management of transboundary water resources and related water supply and water quality issues, and referred the question of the definition of legal principles for the protection, rational use and development of transboundary rivers and lakes to Working Group III and further requested the Secretary-General to report on progress achieved by the International Law Commission (A/46/48, Part I, decision 2/20, paragraph 2/p).

2. The present progress report has been prepared by the secretariat in order to facilitate discussion of this topic in Working Group III. It takes into account recent developments in the International Law Commission of the United Nations, which held its forty-third session in Geneva from 29 April to 19 July 1991, as well as related developments within the United Nations Economic Commission for Europe, regarding its regional draft convention on the protection and use of transboundary watercourses and international lakes.

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II. BACKGROUND

3. While a United Nations compilation published in 1964 contained provisions concerning transboundary watercourses from 253 agreements (ST/LEG/SER.B.B/12), a computerized systematic index prepared by the Food and Agriculture Organization of the United Nations (FAO) now lists more than 2,000 international legal instruments concerning water resources (FAO Legislative Study No. 15, 1978 as updated). The vast majority of these are bilateral agreements concerning specific boundary waters. The Montevideo Programme for the development and periodic review of environmental law, adopted by the UNEP Governing Council (decision 10/21 of 31 May 1982), called for "promotion of agreements between countries of the same hydrological basin for the proper utilization and management of freshwater resources so as to prevent, reduce and control pollution". Indeed, most of the existing multilateral agreements concern geographically limited freshwater basins; these are listed in appendix 1 to the present report, together with relevant non-mandatory/declaratory instruments adopted at an intergovernmental level. Not included here are non-governmental codifications, such as the 1966 Helsinki Rules on the Uses of the Waters of International Rivers drafted by the International Law Association; though highly authoritative, these drafts were not adopted in treaty form and were not the subject of government comments in the course of their preparation.

4. There have been various unsuccessful attempts at drafting legal provisions for transboundary watercourses at a wider regional level, especially within the framework of the Organization of American States (the 1965 Rio de Janeiro Draft Convention on the Industrial and Agricultural Use of International Rivers and Lakes) and within the Council of Europe (the 1974 and 1980 Draft European Conventions for the Protection of International Watercourses Against Pollution). More recently, at the initiative of the Conference on Security and Co-operation in Europe, the United Nations Economic Commission for Europe (ECE) was entrusted with the task of preparing a Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Drafting work on this instrument - which would be applicable to Europe and North America - is expected to be concluded by April 1992, and could provide inspiration for similar instruments in other regions.

5. The second ECE draft prepared in May 1991 (an outline of which is attached to the present report as appendix 2) defines transboundary waters in draft article 1 as "any surface and groundwaters which mark, cross or are located on boundaries between two or more States; wherever transboundary waters flow directly into the sea, these transboundary waters end at a straight line across their respective mouths between points on the low water-line of their banks". The overall approach of the draft is that of a framework convention, to be supplemented by specific agreements between riparian countries. Among the principles specifically referred to in draft article 2 are the precautionary principle, the polluter-pays principle, and the principle of sustainable water use ("ecosystem approach").

III. THE WORK OF THE INTERNATIONAL LAW COMMISSION

6. In response to General Assembly resolution 2669 (XXV) of 8 December 1970, the International Law Commission of the United Nations took up the topic of "the law of non-navigational uses of international watercourses" in 1971. Following successive reports by four special rapporteurs since 1974, the Commission concluded its first reading of a set of 32 draft articles at the forty-third session (Geneva, 29 April to 19 July 1991). These draft articles which will now be circulated by the Secretary- General to Governments for comments, are attached to the present report as appendix 3.

7. The general approach taken by the International Law Commission in developing these draft articles, and endorsed by the Sixth Committee of the United Nations General Assembly, is that of a framework agreement containing general principles and rules concerning all non-navigational uses of international watercourses, which can be applied and adjusted through specific watercourse agreements to suit the conditions of individual watercourses and the needs of the States concerned. According to draft article 2, the geographical and functional scope of these principles and rules extends to the entire hydrographic system (including surface and underground waters) of which a river or lake is a part. While reaffirming the principle of "equitable utilization" in draft article 5, the Commission made it clear in draft article 7 that all uses are subject to the overriding obligation not to cause appreciable harm to other States concerned.

8. While the draft articles primarily aim at the prevention of environmental harm, they also lay down standards of conduct the infringement of which will entail international responsibility. Consequently, there is a close relation between those draft articles and the ongoing work of the International Law Commission on State responsibility and on the related topic of "international liability for injurious consequences arising out of acts not prohibited by international law", summarized in the annual reports of the Commission (see the 1990 report in the Official Records of the General Assembly, Forty-fifth session, Supplement No. 10, A/45/10).

9. The Working Group may wish to take the above-mentioned regional and global drafting work into account when examining possible areas for the further development of international environmental law.

APPENDIX 1

List of Existing Multilateral Agreements and Instruments on Transboundary Freshwaters

(Not including bilateral agreements, or internal instruments of regional economic integration organizations)

		Parties
(1)	Convention Relating to the Development of Hydraulic Power Affecting More than One State (Geneva, 9 December 1923)	11
(2)	Convention Concerning Fishing in the Waters of the Danube (Bucharest, 29 January 1958)	6
(3)	Conventions on the Protection of Lake Constance Against Pollution (Steckborn, 27 October 1960) and on the Regulation of Water Abstractions from Lake Constance (Berne, 30 April 1966)	3
(4)	Protocol Concerning the Constitution of an International Commission for the Protection of the Mosel Against Pollution (Paris, 20 December 1961)	3
(5)	Convention on the International Commission for the Protection of the Rhine Against Pollution (Berne, 29 April 1963) as amended	6
(6)	Act Regarding Navigation and Economic Co-operation Between the States of the Niger Basin (Niamey, 26 October 1963) and related agreements (1964-1980)	9
(7)	Convention and Statute relating to the Development of the Lake Chad Basin (N'Djamena, 22 May 1964) as amended and supplemented (1972-1977)	4
(8)*	European Water Charter (Strasbourg, 6 May 1968)	(Council of Europe)
(9)	Treaty on the River Plate Basin (Brasilia, 23 April 1969) and related declaration (*Asunción, 3 June 1971)	5

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* Non-mandatory instruments marked by an asterisk.

(10)	Conventions Concerning the Status of the Senegal River, and Establishing the Senegal River Development Organization (Nouakchott, 11 March 1972) as amended and supplemented (1978)	3
(11)	Conventions for the Protection of the Rhine River Against Chemical Pollution, and Against Pollution by Chlorides (Bonn, 3 December 1976)	6
(12)*	Action Plan of the United Nations Water Conference (Mar del Plata, 25 March 1977), endorsed by General Assembly resolution 32/158 of 19 December 1977	(UNGA)
(13)	Agreement for the Establishment of an Organization to Manage and Develop the Kagera River Basin (Rusumo, 24 August 1977) and related agreement (1981)	4
(14)*	Recommendations on Water Management Policies and Instruments, adopted by the Council of the Organisation for Economic Co-operation and Development (Paris, 5 April 1978)	(OECD)
(15)	Conventions Relating to the Status of the River Gambia, and the Creation of the Gambia River Basin Development Organization (Kaolack, 30 June 1978) as amended (1981)	4
(16)	Treaty for Amazonian Co-operation (Brasilia, 3 July 1978) and related declaration (*Manaus, 6 May 1989)	8
(17)*	Principles Regarding Co-operation in the Field of Transboundary Waters, adopted by the United Nations Economic Commission for Europe (Geneva, 10 April 1987)	(ECE)
(18)	Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System (Harare, 28 May 1987)	5
(19)*	Charter on Ground-Water Management, adopted by the United Nations Economic Commission for Europe (Geneva, 21 April 1989)	(ECE)
(20)*	Code of Conduct on Accidental Pollution of Transboundary Inland Waters, adopted by the United Nations Economic Commission for Europe (Geneva, 27 April 1990)	(ECE)

APPENDIX 2

Outline of the UN/ECE Draft Convention on the Protection and Use of Transboundary Watercourses and International Lakes*

Preamble

Article 1: Definitions

PART I - PROVISIONS RELATING TO ALL PARTIES

Article 2: General Provisions

Article 3: Prevention, control and reduction

Article 4: Monitoring

Article 5: Research and development

Article 6: Exchange of information

Article 7: [Responsibility and liability]

Article 8: Protection of information

PART II - PROVISIONS RELATING TO RIPARIAN PARTIES

Article 9: Bilateral and multilateral cooperation

Article 10: Consultations [Environmental impact assessment]

Article 11: Joint monitoring and assessment

Article 12: Common research and development

Article 13: Exchange of information between Riparian Parties

Article 14: Warning and alarm systems

Article 15: Mutual assistance

Article 16: Public information

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* Second draft prepared by the Working Party on Water Problems (of the Senior Advisers to ECE Governments on Environmental and Water Problems, United Nations Economic Commission for Europe) at its fourth special session in May 1991; full text in document ENVWA/WP.3/R.19/Rev.1. Provisions under further negotiation are shown in square brackets.

PART III - INSTITUTIONAL AND FINAL PROVISIONS

Article 17: Meeting of Parties

Article 18: [Right to vote]

Article 19: Secretariat

Article 20: Amendments to the Convention

Article 21: Settlement of disputes

Article 22: [Reservations]

Article 23: Signature

Article 24: Ratification, acceptance, approval and accession

Article 25: Entry into force

Article 26: Withdrawal

Article 27: Authentic texts

Annex I: Definition of the term "best available technology"

Annex II: Guidelines for developing water-quality objectives and criteria

Annex III: [Arbitration]

APPENDIX 3

Draft Articles on the Law of the Non-navigational Uses of International Watercourses*

Part I

INTRODUCTION

Article 1

Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Article 2

Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3

Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

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* As adopted in first reading by the International Law Commission of the United Nations at its forty-third session (Geneva, 29 April-19 July 1991).

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4

Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

Part II

GENERAL PRINCIPLES

Article 5

Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present article.

Article 6

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(d) existing and potential uses of the watercourse;

(e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

Article 7

Obligation not to cause appreciable harm

Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

Article 8

General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimum utilization and adequate protection of an international watercourse.

Article 9

Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10

Relationship between uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys an inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors contained in articles 5 to 7, with special regard to the requirements of vital human needs.

Article 11

Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

Article 12

Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Article 13

Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

Article 14

Obligations of the notifying State during the period for reply

During the period referred to in article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.

Article 15

Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall communicate this finding to the notifying State within the period referred to in article 13, together with a documented explanation setting for the reasons for the finding.

Article 16

Absence of reply to notification

If within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

Article 17

Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Article 18

Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

Article 19

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of article 17.

Part IV

PROTECTION AND PRESERVATION

Article 20

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

Article 21

Prevention, reduction and control of pollution

1. For the purposes of the present articles, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

Article 22

Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in appreciable harm to other watercourse States.

Article 23

Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

Part V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 24

Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltations, erosion, salt-water intrusion, drought or desertification.

Article 25

Emergency situations

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct as for example in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

Part VI

MISCELLANEOUS PROVISIONS

Article 26

Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

Article 27

Regulation

1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

Article 28

Installations

1. Watercourse States shall within their respective territories employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer appreciable adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

Article 29

International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall not be used in violation of the principles and rules of international law applicable in international and internal armed conflict and shall enjoy the protection accorded by those principles and rules.

Article 30

Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations through any indirect procedure accepted by them.

Article 31

Data and information vital to national defence or security

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Article 32

Non-discrimination

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.